IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CONFIRMATION CASE NO. 6 OF 2002

The Customs .... Appellant

versus

Prince Ozochokwu Uzozie ..... Respondent.

ALONGWITH

CRIMINAL APPEAL NO. 1278 OF 2003
(By Original Accused No.1.)

Larry Obisike Aguocha ..... Appellant

versus

The State of Maharashtra
(The Customs, Central Excise,Mumbai)..Respondent

AND

CRIMINAL APPEAL NO. 46 OF 2003
(By Original Accused No.2)

Prince Ozochokwu Uzozie .... Appellant

versus

Shri P.M. Dhole and another. .. Respondents.

AND

CRIMINAL APPEAL NO. 3 OF 2003
(By Original Accused no.3)

Mrs. Nwamaka Egemole ... Appellant

versus

Shri J.L. Pandey (I.O.)
NCCP Customs Preventive,Bombay .... Respondent

AND

CRIMINAL APPEAL NO. 1482 OF 2003
(By Union of India against
acquittal of accused no.4.)

Union of India ..... Appellant.

versus

Mr. Ajay Shivkumar Jain and anr..... Respondents.

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Shri D.N. Salvi advocate for the Union of India in Confirmation Case and for the appellant in Appeal No.1482 of 2003 and for the Respondents - Union of India in other three appeals.

Mrs. P.H. Kantharia APP for the State in all matters.

Shri Atul S. Sarpande advocate for appellant in Appeal No. 3 of 2003.

Shri Ayaz Khan advpcate with Shri P.S. Hingorani advocate for appellant in Appeal No.1278 of 2003.

Shri A.P. Mundargi advocate with Shri H.E. Mooman for appellant in Appeal No.46 of 2003 and for Respondent in Confirmation Case No.6 of 2002.

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CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED; 26TH OCTOBER, 2004.

JUDGMENT (Per Palshikar, J.);

1. The four accused persons were prosecuted in N.D.P.S. Special Case No.92 of 1999 for commission of certain offences under the N.D.P.S. Act. Provisions of section 31(A) of the NDPS Act were added by

amendment to 1985 Act whereby it was provided that second offences of certain kind described in that section would invite death sentence only, and that was the offence held proved by the learned trial Judge against original accused no.2. According to the learned Sessions Judge, such offences are covered by section 31(A) and he therefore made reference by Confirmation Case No.6 of 2002 for confirmation of the death sentence. The learned trial Judge found accused nos.1, 2 and 3 guilty of various offences under the Act as mentioned in the impugned order.

2. Criminal **Appeal No.1278 of 2003** is separately and independently preferred by accused no.1. Criminal **Appeal No. 46 of 2003** is preferred by accused no.2, and Criminal **Appeal No. 3 of 2003** is preferred by accused no.3. The State is also aggrieved by the acquittal of accused no.4 and has therefore preferred Criminal **Appeal No 1482 of 2003.** All these appeals and the Confirmation Reference arise out of the same NDPS case and are based on same set of evidence, the accused persons were involved in one single crime for which they were presecuted under the Act in this case. Therefore all the appeals were heard together along with the Confirmation Case. The contention of the appellants is that they are entitled to acquittal for

lack of evidence proving any offence with which they were charged. The State i.e. the Union of India through the department of Customs and Excise, claims that the reference for Confirmation of death sentence is liable to be accepted and acquittal of accused no.4 is liable to be set aside. Since identical facts are involved in all these cases, reappreciation of which is necessary for the purpose of disposal of these appeals. Hence we heard the appeals and Confirmation matter together and it is being disposed of by this common order.

3. The case of the prosecution stated briefly is that on 21-11-1998 P.w.1 Mr. Albert Isaac John Issac then working as Inspector, Central Excise, Bombay received a telephone call from an informant around 6.15 in the morning that some crime has taken place. He therefore called him (the informant) to his office and reached his office around 7.15 in the morning. The informant met the inspector and disclosed to him certain information which was reduced in writing by the inspector. It was to the effect that three Nigerian citizens i.e. accused Nos.1 to 3 were storing 3 to 4 kgs. of heroin, a narcotic drugs, in their flat situated at 2/4, C/4, Sector 23, Vasundhara Co-op. Hsg. Society, Koparkhairane, Navi Mumbai. The witness

then came to the office, prepared a fair copy of the information and put it in a sealed cover. He then contacted Assistant Commissioner of Customs Shri S.N.Prasad and informed him about the information received. 21-11-1998 was a Saturday and the office was therefore closed. Hence the witness informed the Assistant Commissioner on telephone, who issued instructions to carry out raid at the above mentioned premises. Accordingly the officers including the Assistant Commissioner assembled at the designated place and raided the premises. The raid disclossed existence of a plastic bag containing some powder which was later on analysied as heroin. The accused persons were thereafter arrested and after the investigation was completed they were prosecuted under section 29 read with 8(C) and 21 of the NDPS Act and accused no.2 was actually charged under section 31(A), i.e. under section 21 read with 8(C) and 29 of the NDPS Act.

4. The prosecution examined in all 15 witnesses to prove its case and after completion of the evidence, the learned trial Judge came to the conclusion of guilt. According to the learned trial Judge the accused no.2 was found guilty of the offence for the second time and therefore he by applying section 31(A) of the Act sentenced the accused no.2 to death and

other accused to various following punishments.

> Accused Nos. 1 and 3 are sentenced to suffer R.I. for ten years each and to pay fine of Rupees one lac each, in default to suffer further R.I. for six months each for each of the offence.
>
> The substantive sentences to concurrently.
>
> Set off be given to the accused for the period already undergone from the date of arrest till this date u/s. 428 Cr.P.C.

It is this sentence which is challenged by each accused persons before us. The learned trial Judge acquitted the accused no.4 for lack of evidence and the Customs Department has come up in appeal against this acquittal. We have to consider these appeals in the light of our re-appreciation of evidence and other material on record.

5. The prosecution has examined in all 15 witnesses to prove its case against the accused persons. P.w.1 is Mr. Albert Isaac, an Inspector of Central Excise who received the information from the informant and on the basis of which the entire investigation was started. P.ws. 2 to 6 are all officers of the Customs and Excise department, who were present at the time when the raid was conducted on 21-11-1998. P.w.7 Kamlakar is the owner of an adjacent flat in the same building. He has deposed that he let out the flat belonging to

one Shinde on rental basis to the accused persons. He mentioned that the agreement was with Larry Obisike Aguocha, accused no.2. It only shows the occupation of the said premises by the accused. P.w.8 Mrs. Geeta is the wife of P.w.7 Kamlakar. She was one of the panch at the time when the raid took place. She has however turned hostile. The other panch is not examined and the panchanama is proved by the officer who wrote it. P.w.9 is one Mr.Malhari Shinde, who is the owner of the flat and he deposed in the court about the lease agreement entered into between him and the accused no.1. He thus proved that the occupation of the flat was legal and was with accused no.1. P.w.10 C.I.Mathew is the Superintendent of Customs and he proves the previous conviction of the accused no.2. Factually there is no dispute about the previous conviction and the contention raised, pertains to interpretation of Sec. 31-A only.

6. P.w.11 Palanivel is an Inteligence officer of Narcotic cell at Bombay. He carried a sealed envelop from the cell, handed over to him by the Superintendent and then handed it over to Forensic Science Lab, Kalina in a sealed condition. He has deposed that the sample packet was in a sealed condition at all times. P.w.12 Neil Isaac has stated that she has seen accused no.3

living in the next door flat. She thus proves the occupation of the flat by accused no.3. P.w.13 Mrs. Sandhya is the person who acted as a broker for letting of the flat of Mr. Shinde to the accused persons. However the witness was declared hostile. It may be noted here that the fact of lease of the premises owned by Mr. Shinde to accused no.1 is not in dispute. The contention all along is that the lease was not for all the three accused persons and therefore there cannot be presumption of their occupation. P.w.14 Mr. Chauhan proves that the summons could not be served on one witness called Ganpat. P.w.15 is Shri S.N.Prasad, Deputy Commissioner of Central Excise. At the relevant time he was Assistant Commissioner of Customs and was in charge of the Narcotic Cell. He speaks about the manner in which the raid was conducted and has proved that the entire proceedings were proper, legal and valid.

7. It is on appreciation of this evidence that the learned trial Judge came to the conclusion of guilt of all the three accused and found this evidence grossly inadequate in relation to accused no.4 and therefore proceeded to acquit accused no.4. The learned trial Judge taking into consideration the fact that the accused no.2 Prince Ozochokwu Ozozie was earlier

convicted for an offence punishable under sections 19, 24 and 27-A involving commercial quantity of any Narcotic Drug and therefore reading the provisions of Section 31-A found that he is liable to be convicted under that section with death penalty. He therefore proceeded to sentence accused no.2 Prince O.Uzozie to death and as required by the Criminal Procedure Code made reference which we are now considering.

8. We propose to deal with the Confirmation reference first. For that purpose we will have to consider the scope and extent of provisions of section 31-A as added to the N.D.P.S. Act of 1985. Section 31-A reads as under:

> **31-A. Death penalty for certain offences after previous conviction:-**
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> *(1) Not withstanding anything contained in section 31, if* **any person who has been convicted of** *the commission of, or attempt to commit, or abetment of, on criminal conspiracy to commit,* **any of the offences punishable** under section 19, section 24, **section 27-A and for offences involving commercial quantity of any narcotic drug or** *pshychotropic substance, is subsequently convicted of the commission of or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to,-*
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> *(a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transhipment,* **of**

the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity which is equal to or more than the quantity *indicated against each such drug or substance, as specified in column (2) of the table.*

(b) Financing, directly or indirectly, any of the activities specified in clause (a), shall be punishable with death.

(2) Where any person is comnvicted by a competent Copurt of criminal jurisdiction outside India under any law corresponding to the provisions of section 19, section 24 or section 27-A and for offences involving commercial quantity of any narcotic drug or psychotropic substance such person, in respect of such conviction, shall be dealt with for the purposes of sub-section (1) as if he had been convicted by a court in India.

9. In order to appreciate what is the scope and extent of this provision of section 31-A, we must look into the legislative history in this regard. It is an accepted fact that offences under this Act are of very serious nature and repetition of such offences is disasterous and it was with this back ground that the amendment by which section 31-A was added to the Act in the year 1989. From the date of enactment of this section, the repetition of an offence of the kind defines therein is made punishable with death sentence only and it is because of that the present confirmation reference arises, as the learned trial Judge having chosen to apply the provisions of section 31-A. Several submissions were made at the bar including those touched the constitutional validity of this

section. However, we do not intend to go to the larger aspect of the submissions. We would confined the submissions upto the interpretation of section 31-A as it stands at the statute with effect from 29th May 1989.

10. In order to attract the provisions of section 31-A the prosecution has to prove that during the trial of the second or subsequent offences the accused has been convicted of any of the following:

1) Conviction under section 19 for commission of offence defined therein, or

2) Conviction under section 19 for attempting to commit that offence, or

3) conviction for abetment of that offence, or

4) Criminal conspicary to commit that offence mentioned in section 19, or

5) Conviction under section 24 of the NDPS Act, or

6) Conviction for attempt to commit that Act, or

7) Conviction for abetment of that crime, or

8) Conviction for criminal conspiracy to commit that crime, or

9) Conviction for any offence under the NDPS Act involving commercial quantity of narcotic drug or psychotropic substance.

and then he is liable to be convicted under this section for the subsequent offences. The section

provides for the quantity which is termed as commercial quantity for any narcotic drug or psychotropic substance. The prosecution therefore must prove that the accused has committed any one of the above quoted offences or any offence involving commercial quantity of any narcotic drugs and has committed subsequently any of the offences mentioned in clause (a) and clause (b) of section 31-A. Clause (a) of Section 31-A speaks of an offence relating to engaging in the production, manufacture, possession, transportation, import into India, export from India or transhipment of the narcotic drugs pr psychotropic substance specified under column (1) of the table and **involving the quantity** which is equal to or more than the quantity indicated against each such drug of substance. Therefore in order to attract death penalty in this section, the prosecution must prove: (a) that the accused has convicted for any of the offences as described above and (b) accused is being prosecuted for offence mentioned in section 31-A clause (a) and clause (b).

11. It is pertinent to note that section 31-A clause (a) speaks of production, manufacture, possession, transportation, import into India, export from India or transhipment of the narcotic drugs or psychotropic

substance specified in column (1) involving the quantity which is equal to or more than the quantity indicated against each such drug or substance, as specified in column (2). Therefore for invoking penalty under this section, the prosecution has to prove what is mentioned in clause (a) and clause (b) above. We will have to consider whether such proof is available in the present case.

12. According to the prosecution, 3 kgs. contraband substance was found in the house of the accused. It was taken for Chemical Analysis and the analysis revealed that the contents of heroin in that 3 kgs. substance was 3.70% i.e. to say the accused were in possession fo 108 gms. of heroin. This quantity, even if the entire prosecution evidence is accepted as correct, is not the quantity, possession of which is necessary for attracting death penalty. That necessary quantity is 1 kg. in so far as heroin is concerned. There is therefore no proof on record to show that the accused no.2 was in possession of 1 kg. or more of heroin. Thus provisions of section 31-A are not attracted to accused no.2. There is no reason in the circumstances, to accept the reference as made by the learned Trial Judge. The learned trial Judge erred in applying the provisions of section 31-A for convicting

the accused to suffer death sentence. The learned trial Judge, it appears, has overlooked the requirements involving commercial quantity as mentioned in the table. That being the position, we need not go to any other questions pertaining to validity of section which can be considered in appropriate cases. **We accordingly reject the reference.** The reference is rejected because, according to our interpretation of that section it is not attracted in the present case at all. That brings to form a question as to what is the offence if any, committed by the accused no.2 against whom conviction was recorded under section 31-A.

13. The other accused persons have been convicted under section 21 read with 8(c) and section 29 of the NDPS Act. Section 29 provides for punishment for conspiracy. The entire evidence even if it is accepted does not prove any such conspiracy between the accused persons. The conviction under section 29 to any of the accused is therefore unsustainable.

14. Therefore it takes us to the question as to what offence if any, is committed by the three accused persons. Primafacie it is obvious that they are punished under section 21(b) of the NDPS Act as the quantity involved was less than commercial quantity but

greater than the small quantity. We would therefore consider the appeal of accused no.2 against conviction under section 21 read with 8(c) of the Act.

15. That takes us to the question of correctness of the judgment impugned in these appeals by the accused persons claiming that their conviction is unsustainable in law and therefore they are entitled to acquittal. Since we have considered the evidence at length and we have re-appreciated it in detail, though such appeals against sentence of 10 years are liable to be considered by learned Single Judge of this court, we deem it just and proper in the circumstances of this case, to decide these appeals against conviction also on the basis of re-appreciation of evidence as undertaken by us. The learned counsel appearing on behalf of the accused has seriously raised the following contentions:

1) That the raid was not conducted in accordance with the law.

2) Seizure of 3 kgs. of heroin has not proved, even if the entire evidence is accepted as according to Chemical Analyser the contents of heroin in the contraband

seized was 3.7%, then the quantity of heroin found in possession of accused would be 108 gms.

3) The evidence regarding sealing of the samples and sending them for analysis before the Forensic Science Laboratory is also inconclusive and therefore such conviction is unsustainable.

4) In relation to drawing of samples and sealing them, the evidence is inadequate and therefore they are liable to be acquitted.

5) The contraband was seized from kitchen behind the gas cylinder in the flat rented to or occupied by accused no.1.

6) Apart from the fact that any one could have pointed out the property, the possession can at the most be traced with accused no.1 to whom the flat was rented and it cannot be foisted to accused nos.2 and 3 as there is no evidence to connect them to conscious possession of the contraband.

16. We have to consider all these submissions in the light of the evidence as re-appreciated by us during the course of argument of these appeals. We see no reason why the entire evidence be not accepted. The prosecution has proved beyond doubt the following.

1. Possession of 108 gms. of heroin from the house rented to accused no.1.

2. Presence of accused nos.1, 2 and 3 at the time of raid.

3. That the procedure for conducting the raid was proper.

4. That the samples drawn were always in sealed condition and in the transit to the laboratory is also proved to be in sealed condition. For all these reasons therefore the conviction of the accused persons is not liable to be touched.

17. However serious doubts arise in regard to the conviction of accsed nos.2 and 3. There is no evidence on record to show that the accused nos.2 and 3 were in conscious possession of the heroin. Merely because

they were present at the time when the raid was conducted, there is no ground to infer conscious possession of these two persons. If statements in the nature of events itself is accepted, conscious possession of accused nos.2 and 3 is not proved. What they knew inferencely was that the accused no.1 was in possession of some contraband. Even if we assume such knowledge in them, it cannot be said that they were in possession of the contraband to attract conviction under section 8(c) read with section 21 of the Act.

18. In our opinion there is no reason to reject the evidence of the prosecution in so far as accused no.1 and his possession of the contraband is concerned. We therefore affirm the order of the learned trial Judge in convicting and sentencing the accused no.1 under section 8(c) read with section 21 of the Act. In our view regarding conscious possession of the contraband by accused nos.2 and 3, we find ourselves unable to agree with the order of conviction and sentence in relation to accused nos.2 and 3.

19. In the result the appeal filed by **accused no.1 is rejected** and he is convicted under section 8(c) read with 21 of the NDPS Act and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. one lac.

20. In so far as the appeals against conviction by accused nos.2 and 3 are concerned, we allowed the appeals of accused nos.2 and 3 on the ground of failure of the prosecution to prove conscious possession of the contraband with accused nos.2 and 3. **Their appeals are accordingly allowed and they be set at liberty.**

21. In so far as appeal filed by Government of India against acquittal of accused no.4 is concerned, it is clear that the inference of acquittal as recorded by the learned trial Judge is based on sound conclusion of law and fact. Except for mention of his name by some witness, there is no proof against accused no.4. Apart from that basically the secret information recorded by P.w.1 is totally silent about anything being done by accused no.4. In such circumstances, we see no reason to interfere with the order of acquittal. **The appeal against the accquittal of accused no.4 is therefore dismissed.**

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contd.

22. After the above judgment was pronounced, request is made on behalf of the Union of India, to issue directions to appellant nos. 2 and 3 whose appeals have been allowed, not to leave India without prior permission of this court. We accordingly so direct.

This order shall operate for eight weeks from today.

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